



LAW DAY ★ 2019

Free speech rights and the rise of anti-BDS legislation

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Deep Dive

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EDITOR'S NOTE: *Since the print edition of our Law Day magazine went to the printers in mid-April, two federal trial courts took action on the cases. This version of the article has been updated to reflect those rulings.*

In 2005, Palestinian civic groups called for a movement to boycott, divest from and sanction companies that do business with Israel. The controversial campaign took on a shorthand name, BDS.

In response to BDS, American state governments started to pass so called anti-BDS laws and governors entered executive orders aimed at protecting their states' business, cultural and academic ties to Israel. Today, 27 states have some type of formal anti-BDS declaration in effect.

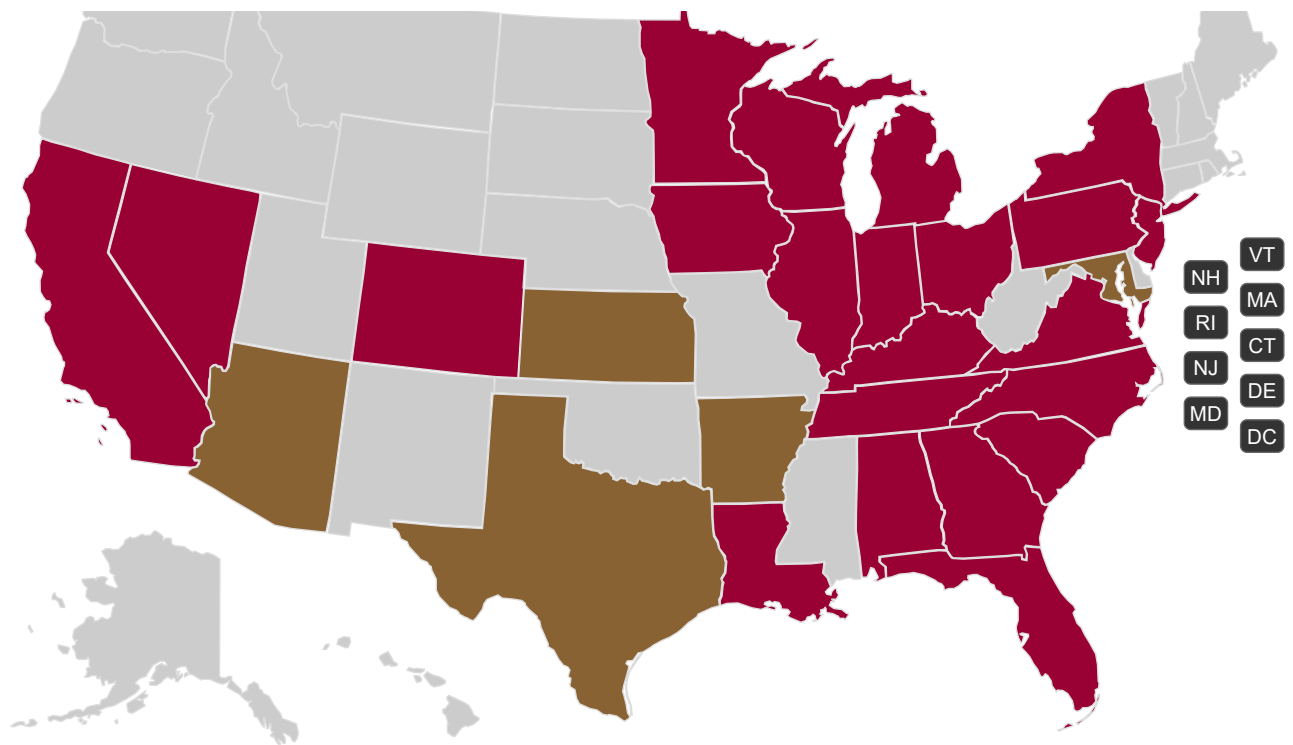
Typically, these laws take one of two forms.

In one version, the state requires contractors to certify, in writing, their refusal to participate in boycotts against Israel or territories controlled by Israel.

The other version — pioneered by Illinois' law passed in 2015 — prevents state pension funds from investing in any companies involved in BDS.

As of late March, there are six lawsuits challenging the constitutionality of the contractor provision in five different states. So far, the state laws addressing pension divestments, including Illinois' law, have gone unchallenged.

States with anti-BDS measures on the books



At their core, the constitutional challenges question whether participation in BDS boycotts are “inherently expressive conduct.”

In other words, are these boycotts considered First Amendment-protected speech, or are they conduct that only becomes expressive with associated speech?

Inherently expressive or just conduct?

Proponents of anti-BDS laws assert that BDS participation is not speech and therefore has no constitutional protection.

The laws’ supporters cite the U.S. Supreme Court’s 2006 decision in *Rumsfeld v. Forum for Academic and Institutional Rights Inc.* which unanimously upheld the constitutionality of a federal law which allows the government to withhold funds from colleges that don’t allow access for military recruiters.

In that case, a group of law schools sought to block military recruiting on campus because of the military’s discrimination based on sexual orientation. The Solomon Amendment, the plaintiffs schools argued, forced them to choose between their right to protest and their federal funding.

“I think the court has clearly said in *Rumsfeld v. FAIR* that the decision of who you do business with or not, even when you have a clear ideological motive, does not become expressive,” said Eugene Kontorovich, a professor at George Mason University Antonin Scalia Law School and a director at the Kohellet Policy Forum in Jerusalem.

Kontorovich taught at the University of Chicago Law School and then Northwestern University Pritzker School of Law from 2005 until last year. He was a one-time law clerk to former 7th U.S. Circuit Court of Appeals Judge Richard A. Posner.

The anti-BDS contingent also cites the 1982 U.S. Supreme Court case, *International Longshoremen’s Association, AFL-CIO v. Allied International Inc.*, which held that a union’s secondary boycott was illegal under federal labor law.



Attorney Marc Greendorfer founded the Zachor Legal Institute, a think tank focused on legal challenges to the BDS movement. He said the *Longshoremen case shows that the government can limit boycotts that serve as political protest of foreign nations' conduct*.

"It happens to be the case that *International Longshoremen's* involved unions, but it also involved directly analogous fact patterns," Greendorfer said.

Opposition to BDS by mainstream American Jewish communities and other U.S. supporters of Israel contend BDS is discriminatory and, through support of a Palestinian right of return to their homes in the state of Israel, seeks to undermine or eliminate Israel's existence as a Jewish homeland.

Supporters of BDS maintain their movement is a nonviolent effort to end what its supporters consider an illegal occupation of the West Bank, Gaza Strip and Golan Heights — territories captured by Israeli forces from Jordan, Egypt and Syria during the Six-Day War in 1967.

They argue their boycotts fall squarely under what the U.S. Supreme Court defined as constitutionally protected expressive conduct in the 1982 case *NAACP v. Claiborne Hardware Co.*

The American Civil Liberties Union has not taken a position on BDS or boycotts of other foreign nations, but the organization has stepped in to oppose the anti-BDS laws on grounds they violate Americans' right to protest.

"The notion that participating in a boycott is not inherently expressive, I think the Supreme Court has answered that question already," said Brian Hauss, ACLU attorney who argued against the laws in Kansas and Arizona.

So far, four federal judges in four separate cases in Texas, Kansas, Arizona and Arkansas have answered this question, specifically as it relates to boycotts of Israel.

In Texas, Kansas and Arizona, judges held that boycotts sponsored by BDS are inherently expressive speech. In Arkansas, the judge held the opposite, finding there is no First Amendment protection for those who engage in boycotts of Israel.

The rulings in Texas, Arizona and Arkansas have been appealed to the U.S. 5th, 9th and 8th Circuit Courts of Appeal, respectively. Three cases could lead to different interpretations.

The case for conduct

In January, Chief U.S. District Judge Brian S. Miller of the Eastern District of Arkansas dismissed *Arkansas Times v. Waldrip*, a lawsuit that alleged the state's law was an unconstitutional violation of the newspaper's First Amendment rights. Miller found *FAIR* is the controlling precedent and BDS boycotts are not inherently expressive speech or therefore protected.

The Arkansas law prohibits state entities from entering contracts with companies unless those companies certify in writing that they won't boycott Israel.

The publication sued when a public university made its paid advertising in the paper contingent on the written certification.

Companies that do not provide written certification may still contract with a state entity — but it must first offer to provide its goods or services for a discount, according to the law.

After the paper's publisher did not sign the certification, he filed a lawsuit seeking a preliminary injunction prohibiting the enforcement of the law's certification provision.

Miller denied the paper's motion for preliminary injunction.

"Like the law schools' decision to prevent military recruiters from coming to campus, the decision to engage in a primary or secondary boycott" Israel requires explanatory speech, Miller wrote.



observer to have any idea that a boycott is taking place.”

Miller also cited *Longshoremen*, which “held that there is no unqualified right to boycott or a constitutional right to refuse to deal, or perhaps no First Amendment interest in boycotting at all,” he wrote in his 17-page opinion.

In February, the newspaper, represented by ACLU attorneys, filed an appeal to the St. Louis-based 8th Circuit.

Hauss, one of those attorneys, argued *FAIR* shouldn’t control because that case didn’t concern a consumer boycott movement and neither the word ‘boycott’ nor any citation to *Claiborne* appears anywhere in the *FAIR* ruling.

“The notion that *FAIR* could overrule *Claiborne*, without even mentioning it, doesn’t really pass the laugh test,” Hauss said. “I think everyone understands when someone is participating in a BDS boycott that they are expressing something.”

Claiborne involved a politically motivated boycott of white store owners in 1966 by blacks in Port Gibson, Miss. The boycotters were protesting racial inequality and injustice and sought “to gain equal rights and opportunities for Negro citizens,” according to the high court’s 1982 opinion.

In 1969, the store owners sued the boycott organizers and argued they should be held liable for all the lost earnings.

In an 8-0 decision penned by Justice John Paul Stevens, SCOTUS held “the nonviolent elements of petitioners’ activities are entitled to the protection of the First Amendment.”

The case for expression

In September, U.S. District Judge Diane J. Humetewa of the District of Arizona granted a motion enjoining Arizona’s anti-BDS law from taking effect in *Jordahl v. Brnovich*.

She ruled *Claiborne* controls when deciding if a boycott is inherently expressive conduct.

Plaintiff Mikkel Jordahl is an attorney who boycotts businesses that operate from Israeli settlements in the West Bank.

His solo practice contracts with an Arizona county jail to provide legal advice to prisoners. He sued over the Arizona law, which prohibits the state from entering a contract with any party that won’t sign an agreement not to boycott Israel.

Humetewa found that the Arizona law violated Jordahl’s First Amendment rights.

She ruled the commercial actions of one person may not deserve First Amendment protections.

“However, when a statute requires a company, in exchange for a government contract, to promise to refrain from engaging in certain actions that are taken in response to larger calls to action that the state opposes, the state is infringing on the very kind of expressive conduct at issue in *Claiborne*. ... A restriction of one’s ability to participate in collective calls to oppose Israel unquestionably burdens the protected expression of companies wishing to engage in such a boycott,” she wrote in her 36-page opinion.

The state appealed to the 9th Circuit in February.

In the Western District of Texas, U.S. District Judge Robert Pitman’s April 25 ruling reached the same conclusion as Humetewa’s decision in Arizona.

The case before Pitman involved five plaintiffs in Texas who either lost contracting opportunities with the state for not agreeing to certify their refusal to boycott Israel or they did certify their refusal to boycott, against their conscience.

Pitman’s 56-page order found *Claiborne* controlling, and he stated unequivocally: “Boycotts are speech.”



the First Amendment protects political boycotts, is not discussed,” Pitman wrote in rejecting the state’s argument that FAIR should control.

Gadeir Abbas, senior litigation attorney with the Council on American-Islamic Relations, described Pitman’s ruling as “a complete victory of the First Amendment against Texas’s attempts to suppress speech in support of Palestine.”

“More importantly, it’s a complete victory for all Texans, to engage in political speech without government censorship,” he said in a statement.

A spokesperson for the Texas Attorney General’s Office said the state plans to appeal Pitman’s decision to the 5th U.S. Circuit Court of Appeals.

Those defending the constitutionality of the laws, like Kontorovich, maintain the trial court misinterpreted *Claiborne* to convey First Amendment protections to all activities associated with boycotts.

“The actual issue at hand [in *Claiborne*] involves actual boycott organizing activities, basically calling on people to boycott and promoting a boycott, that is speech,” he said. “The state can still get contracts under the state law if they say ‘We hate Israel and we think Israel should be boycotted.’ ... They are entirely entitled to contract with the state because that’s speech. ... Boycotting Israel by itself does not tell you anything about the motives of the boycott.”

A tailored-down tactic

On April 16, Arizona Gov. Doug Ducey signed into law an amended version of the anti-BDS law. This new version limits the scope of the law to only apply to contractors with 10 or more employees and \$100,000 or more in contracts.

Hauss said he could not speak to how the amended law will affect the ACLU’s pending litigation.

“But ... it seems our client [Jordahl] will not be forced to sign the anti-boycott certification under the new law,” Hauss said in an email.

In a blog post on the ACLU’s website, Hauss noted the Kansas legislature and governor employed a similar tactic after U.S. District Judge Daniel Crabtree blocked the enforcement of that state law in January 2018.

Following the amendment to narrow Kansas’ anti-BDS law, plaintiff Esther Koontz was no longer impacted by the law, and the case was voluntarily dismissed.

As Hauss also points out in his post, the legislature in Texas also introduced a bill that would make similar changes to narrow that state’s anti-BDS law.

In the Texas case, the state filed a motion asking the district judge to delay a hearing on a preliminary injunction “because it is highly likely that the Texas Legislature will approve, and Governor Abbott will sign, in the very near future, legislation that would moot this lawsuit.”

“A short continuance until the end of the current legislative session would allow the Court to avoid unnecessarily deciding constitutional questions,” according to the state’s March 20 motion.

U.S. District Judge Robert Pitman denied the state’s motion to continue the hearing. He granted the plaintiffs’ preliminary injunction on April 25.

“The fact that legislation may moot a First Amendment challenge does not negate the real harms a plaintiff allegedly experiences now. To conclude otherwise would allow the Government to allegedly violate constitutional rights indefinitely on the promise that they may pass legislation ceasing their violation of those rights,” Pittman wrote in his March 26 order.



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